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Supreme Court of the United States

WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS D/B/A REPRODUCTIVE SERVICES; SHERWOOD C. LYNN, JR., M.D.; PAMELA J. RICHTER, D.O.; and LENDOL L. DAVIS, M.D., on behalf of themselves and their patients,

Petitioners,

v.

KIRK COLE, M.D., Commissioner of the Texas Department of State Health Services; MARI ROBINSON, Executive Director of the Texas Medical Board, in their official capacities,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* SERVICE WOMEN'S ACTION NETWORK AND RETIRED OR FORMER MILITARY OFFICERS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The Service Women's Action Network ("SWAN") and the following retired or former military officers submit this *amicus* brief[1] in support of Petitioners Whole Woman's Health, Austin Women's Health Center, Killeen Women's Health Center, Nova Health Systems D/B/A Reproductive Services, Sherwood C. Lynn, Jr., M.D., Pamela J. Richter, D.O., and Lendol L. Davis, M.D.

SWAN is a nonpartisan, nonprofit organization that advocates for the increasing number of women who serve, or have served, in our nation's military. Its mission includes educating the public and decision-makers about issues threatening equal opportunity and freedom to serve without discrimination. SWAN also seeks to help further veterans' services to ensure high-quality benefits for women veterans and their families. SWAN believes that protecting service women's constitutional rights and access to health care is important both to service women and their families and the military more broadly. SWAN and its members therefore have a well-founded and direct interest in this litigation.

Additionally, the following individual *amici* are retired or former officers of the U.S. military who have had decades of extensive experience and

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[1] The parties in this case have consented to the filing of this brief. Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, *amici curiae* state that no counsel for a party has authored this brief, in whole or in part, and no person, other than a*mici curiae* or its counsel, has made a monetary contribution to the preparation or submission of this brief.

accomplishment in military leadership. These *amici* also support protecting service women's constitutional rights and access to health care and have an interest in furthering such goals.

Major General Donna F Barbisch (U.S. Army, Ret.) started her military career as a private first class and rose to the rank of major general over a military career spanning more than 38 years. She is on the advisory boards of the Army Women's Foundation and the Women in Military Service to America.

Colonel Ellen H. Haring (U.S. Army, Ret.) served over 28 years, including as a platoon leader, commander, executive officer, and bridge commander. She is currently a Senior Fellow and Program Director with Women in International Security in Washington, D.C., where she directs the Combat Integration Initiative, which is an independent oversight body that provides research and recommendations on the U.S. military's integration of women into ground combat specialties and units. Colonel Haring is also a member of the Board of Directors of SWAN.

Janet C. Jacobson, M.D. (former Lieutenant Commander, U.S. Navy) served as a fighter pilot for 11 years, flying the FA-18 Hornet. Dr. Jacobson then attended medical school, completed a residency in obstetrics and gynecology at the University of Colorado, and a fellowship in Family Planning at the University of Utah.

Lieutenant General Claudia J. Kennedy (U.S. Army, Ret.) served for 31 years and was the first

woman to reach the rank of three-star general in the U.S. Army. She was promoted to Lieutenant General and assigned to the position of Deputy Chief of Staff for Intelligence as of May 1997, and served in various commands across the United States and Europe. Lieutenant General Kennedy has received several military honors, including the Legion of Merit.

Colonel Richard L. Klass (U.S. Air Force, Ret.) flew over 200 combat missions in Vietnam and served as a White House Fellow in the Nixon Administration and in the Pentagon in the Carter Administration, where he dealt with strategic arms control issues. He has received several military honors, including the Silver Star, Legion of Merit, Distinguished Flying Cross, and Purple Heart.

Captain Lawrence J. Korb (U.S. Navy, Ret.) served as Assistant Secretary of Defense (Manpower, Reserve Affairs, Installations and Logistics) from 1981 1984, for which he was awarded the Department of Defense's medal for Distinguished Public Service. He also served four years on active duty as a Naval Flight Officer. Captain Korb is currently a Senior Fellow at the Center for American Progress, a senior advisor to the Center for Defense Information and an adjunct professor at Georgetown University.

Major General Dennis J. Laich (U.S. Army, Ret.) served for 35 years. The last 14 of those years were spent in various command positions, with the most recent being commander of the 94th Regional Readiness Command in Fort Devens, Massachu-

setts. He is currently serving as Ohio Dominican University's PATRIOTS Program director, where he is also the University's support liaison for veterans applying for the PATRIOTS Program.

Lieutenant Colonel Kenneth J. Murray (U.S. Air Force, Ret.), who was admitted to the bars of Massachusetts, Florida, and Arizona, was an Air Force GS-14 Contract Trial Attorney from 1980 to 1999.

Captain Dwayne A. Oslund (U.S. Navy, Ret.) served for 25 years. He was a helicopter pilot who commanded a primary flight training squadron in Corpus Christi, Texas, at which time he was in charge of 100 instructor pilots and 250 flight students from the Navy, Marine Corps, and Coast Guard. More recently, Captain Oslund was a member of a group of retired senior officers and enlisted personnel who successfully advocated for the passage of the Shaheen Amendment to the National Defense Authorization Act, which extended military abortion care to active duty women and dependents who became pregnant as a result of rape or incest.

Captain Joellen D. Oslund (U.S. Navy, Ret.) served for 25 years. She was the first female helicopter pilot in the Navy and the fourth woman to earn Navy wings. Captain Oslund was a plaintiff in *Owens v. Brown*, 455 F. Supp. 291 (D.D.C. 1978), a lawsuit that successfully challenged a statute that restricted women in the Navy from all assignments at sea. In 2012 and 2013, she was also a member of a group of retired senior officers and enlisted personnel who successfully advocated for the passage of the Shaheen Amendment.

Major General Gale S. Pollock (U.S. Army, Ret.) served for 36 years as an Army Nurse. She was the first woman non-physician to serve as the Commander of the Army Medical Department and Acting Surgeon General of the U.S. Army. Her past military assignments include service as Commander of Martin Army Community Hospital and Commanding General of Tripler Army Medical Center. She has also served as an advisor on many boards, including Aetna Military Advisory Board and Humana Veterans Advisory Board, and was previously a Department of Defense Medical Advisor to a U.S. Congressional Committee.

Colonel Katherine E. Scheirman, M.D. (U.S. Air Force, Ret.) served more than 20 years as a physician in the Air Force. Her last assignment was as Chief of Medical Operations for U.S. Air Forces in Europe, at Ramstein Air Base, Germany, where she was responsible for overseeing more than 700 medical personnel and 11 chiefs of medical staff, as well as medical operations for ten hospitals and clinics, an Aeromedical Evacuation Squadron, and an Air Force squadron at Landstuhl Regional Medical Center. Since retiring, Colonel Scheirman has served as chair of the Council of Fellows of the American College of Physician Executives and as a senior advisor to VoteVets.org.

Captain Glenna L. Tinney (U.S. Navy, Ret.) was one of the original 12 Navy social workers recruited for active duty in 1980, and served for 24 years working with military families and managing worldwide family violence and sexual assault programs. She cur-

rently serves as the Military Advocacy Program Coordinator for the Battered Women's Justice Project, a national technical assistance provider for the Department of Justice Office on Violence Against Women.

Amici respectfully ask that this Court consider this brief, which seeks to inform the Court as to the particular burdens that the act at issue imposes on the constitutional rights of women serving in the armed forces.

SUMMARY OF ARGUMENT

If Texas House Bill 2, 83d Legis., 2d Spec. Sess. (Tex. 2013) ("HB2") is permitted to stand, it would affect the rights of all women in Texas—but it would have specific consequences for the rights and health of service women. This Court upheld "the right of the woman to choose to have an abortion before viability" and articulated the "undue burden" test, in *Planned Parenthood v. Casey*, when holding that a restriction on that right violates the Due Process Clause if it has the purpose or effect of imposing an undue burden on women seeking abortion care. 505 U.S. 833, 845-46 (1992) (opinion of the Court); *id.* at 876-77 (joint opinion of O'Connor, Kennedy & Souter, JJ.). This Court held that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on th[is] right." *Id.* at 878. The passage and implementation of HB2 constitutes an undue burden on the constitutional rights of service women.

There are 13 military bases in Texas (as well as several recruiting battalions).[2] As of 2014, there were almost 118,000 active duty service members in Texas,[3] and women generally constitute over 15% of the military population.[4] If HB2 is upheld, many thousands of servicewomen in Texas—as well as dozens of thousands of female military dependents—will be affected.

The rights of female service members are and will be particularly burdened by HB2—simply because they have chosen to serve their country. If HB2 is permitted to fully take effect—along with the final rules adopted by the Texas Department of State Health Services to implement it—then the great majority of facilities that previously provided

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[2] *See State of Texas*, MilitaryINSTALLATIONS, http://www.militaryinstallations.dod.mil/pls/psgprod/f?p=MI:CONTENT:0::::P4_INST_ID,P4_TAB:320049,SI (last visited Dec. 29, 2015). Joint Base San Antonio encompasses the three separate installations of Fort Sam Houston, Lackland Air Force Base and Randolph Air Force Base. *See Joint Base San Antonio (Lackland Randolph Sam Houston), Texas*, MilitaryINSTALLATIONS, http://www.militaryinstallations.dod.mil/MOS/f?p=MI:CONTENT:0::::P4_INST_ID,P4_CONTENT_TITLE,P4_CONTENT_EKMT_ID,P4_CONTENT_DIRECTORY,P4_INST_TYPE:7450,Fast%20Facts,30.90.30.30.60.0.0.0.0,1,INSTALLATION (last visited Dec. 29, 2015).

[3] *See* Office of the Deputy Assistant Secretary of Defense (Military Community and Family Policy), *2014 Demographics—Profile of the Military Community*, 19 (2014) ("2014 Demographics Report"), http://download.militaryonesource.mil/12038/MOS/Reports/2014-Demographics-Report.pdf.

[4] *See id.* at 18.

abortion services in Texas will close. Ten or fewer such facilities in the State would remain, with none at all in various areas of the State. Because of restrictions in the military on access to abortion services, female service members who seek abortion care must often do so through private facilities outside of military bases—such as licensed abortion facilities that have already closed, or will be forced to close, in Texas. With ten or fewer abortion providers likely to remain open in Texas—all but one of which will be concentrated in Texas's four principal metropolitan areas—many service women will be left without access to any reasonably accessible providers. In fact, the entire western half of the state, covering over 130,000 square miles—in which five large military bases are located—would lack any abortion care providers at all. The illustrations in the Appendix show the stark reduction in female service members' access to abortion service providers that would result from HB2.

The drastic reduction of abortion service providers in Texas resulting from HB2, and the attendant highly significant increases in time required to seek abortion care, particularly burdens female military members' constitutional rights, due to specific characteristics of military service. The implementation of HB2 requires women seeking abortion services in Texas to travel much greater distances, and potentially to wait significantly longer to obtain an appointment and care. For example, if HB2 remains in effect, the closest facility for service women at Goodfellow Air

Force Base would be in San Antonio, which is 199 miles away, about a three-hour drive—instead of the previously existing closest facility about 15 minutes away.[5] Similarly, service women at Dyess Air Force Base would have to travel 157 miles to Fort Worth, requiring a drive of over two hours, to reach an abortion facility post-HB2—as opposed to less than 15 minutes pre-HB2.[6] Service women at Fort Hood would have to travel approximately 75 miles to Austin, a drive of almost an hour and a half—instead of less than ten minutes to the previously open facility.[7] Service women cannot choose where they are based, and they cannot simply travel at will to distant abortion care providers.

In order to leave her military base—and to be away from the base for a sufficient amount of time to travel to such a provider and obtain such care—a service woman must obtain leave, or be on an approved pass. The process of requesting leave or a pass can be cumbersome. It requires a superior's approval or signature and there is no guarantee that such leave will be granted, either at all or for the necessary amount of time. Moreover, the time and delays involved in obtaining the necessary leave all decrease service women's opportunities to obtain abortion care in a timely manner. In addition, having to go through the process of obtaining leave and providing necessary documentation (and,

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[5] *See* Appendix.

[6] *See id.*

[7] *See id.*

potentially, explanations for the request) may deter service women from seeking abortion care. Alternatively, if a service woman decides to disobey military rules because she deems that she must do so in order to obtain abortion care, due to the constraints imposed by HB2, she would face potential serious consequences that do not apply to civilian women. In addition, HB2 places particular burdens on service women in Texas preparing to enter deployment zones: severely limiting those women's timely access to abortion care before being deployed can lead to them being unable to join their units in an overseas tour of duty.

Thus, HB2 imposes substantial obstacles to, and significantly burdens the constitutional rights of, service women seeking abortion care.

HB2's burdens on service women are particularly objectionable as women continue, and are increasingly recognized, to be a growing and vital part of the United States' armed forces. Based on a recent change in policy, all combat positions in all branches of the military will be open to women. Various members of the military have recognized the importance of recruiting and retaining all talented individuals—including women—and achieving diversity in the armed forces. As part of continuing to further this goal, service women's constitutional rights must be protected. Failing to do so may undermine maintaining and perfecting a diverse and effective armed forces. *Amici curiae* therefore respectfully urge the Court to reverse the

Fifth Circuit's decision, which upholds the undue burdens imposed by HB2.

ARGUMENT

I. HB2 IMPOSES PARTICULAR UNDUE BURDENS ON THE CONSTITUTIONAL RIGHTS OF SERVICE WOMEN

Due to existing restrictions on abortion care at military hospitals or by military providers, service women must in many instances rely on outside facilities for abortion care. HB2 specifically affects, and imposes substantial obstacles on, the ability of service women to access abortion care because it drastically reduces the number of abortion facilities operating in the state, making it much less likely that a service woman will be able to access abortion care at all, due to particular realities of military life and service.

A. HB2's Effects Are Directly Relevant to Service Women Because, If Seeking Abortion Care, They Must Use Outside Facilities In Many Instances

As a factual matter, service women who seek abortion care must often rely on outside facilities. By statute, military medical facilities may provide abortion care only when the pregnancy results from rape or incest, or endangers the life of the woman.

10 U.S.C. § 1093.[8] Furthermore, military regulations may in some instances further restrict the availability of abortion services at military facilities. For example, Army Regulation 40-400 provides that "[a]bortions may be performed in Army MTFs [medical treatment facilities] at Government expense only when the life of the mother would be endangered if the fetus were carried to term."[9]

This limitation on abortion care available to service women is also reinforced by the limited funding for abortion services in the military system under Tricare health insurance, the health insurance provider for the armed services. Tricare provides insurance coverage for abortions only in the case of a pregnancy that results from rape or incest, or that endangers the life of the woman.[10] Further, for the abortion to be covered under Tricare, in the case of rape or incest "[a] physician must note in the patient's medical record that it is their good faith belief, based on all available information, that the pregnancy was the result of an act

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[8] This restriction on medical treatment facilities or other facilities of the Department of Defense applies independently of the source of funding for the procedure (*i.e.*, even if the service woman seeking such services was prepared and able to cover the cost of such services). *See* 10 U.S.C. § 1093.

[9] Army Reg. 40-400, at 2-18 (July 8, 2014), http://www.apd.army.mil/pdffiles/r40_400.pdf.

[10] *Abortions*, Tricare, http://www.tricare.mil/CoveredServices/IsItCovered/Abortions.aspx?p=1 (last updated Oct. 9, 2014).

of rape or incest."[11] In the case of the endangerment of the woman's life, a "physician must certify that the abortion was performed because the life of the mother would be endangered if the fetus were carried to term."[12]

Moreover, even service women who seek abortion care and whose pregnancies *do* fall within these very limited statutory and regulatory restrictions may need to seek care outside of military medical facilities. Military doctors can assert moral or religious objections and decline to perform abortion services at all, even if a woman's pregnancy falls within one of the categories described above.[13] Therefore, even when seeking an abortion in connection with a pregnancy that endangers her life or results from rape or incest, a woman will not necessarily be able to obtain the procedure on her base, and may need to seek an outside service provider.

Thus, the effects of HB2 are directly relevant to service women. If the Fifth Circuit's decision is affirmed, HB2 will eliminate over 75% of Texas

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[11] *Id.*

[12] *Id.*

[13] *See, e.g.*, Army Reg. 40-400, at 2-18.f; Dep't of the Navy, Bureau of Med. & Surgery, BUMED Instr. 6300.16A, at 5.b(2) & 5.c(2) (Apr. 28, 2014), http://www.med.navy.mil/directives/ExternalDirectives/6300.16A.pdf; Dep't of the Air Force, Air Force Instr. 44-102, at 4.5.2 (Mar. 17, 2015), http://static.e-publishing.af.mil/production/1/af_sg/publication/afi44-102/afi44-102.pdf.

abortion providers, resulting in long-distance travel, overburdened staff, longer waits, and other restrictions to access. *See* Appendix. Service women would especially feel the effects of those consequences, with some women living on military bases in Texas having to drive several hours (and possibly having to obtain overnight accommodation) in order to access abortion care.

B. HB2 Substantially Constrains Service Women's Access to Abortion Care Because They Have Limited Ability to Leave Military Bases, Travel for Longer Distances and Wait to Receive Care

A service woman's ability to leave her military base to access abortion care is limited. Thus, HB2's effects—of drastically reducing the number of available service providers in Texas and significantly increasing the amount of time necessary to seek abortion care—are particularly burdensome for service women, and impose substantial obstacles on service women seeking abortion care.

General leave and pass policies are formulated by the respective branches of the armed forces, and specific policies vary from base to base, sometimes even between units within bases. The leave and pass policies for the Army, discussed below, are illustrative.[14] In order to request leave, a service

[14] In Texas, the Army operates Fort Hood, the largest active duty armored post in the U.S. Armed Services (*see His-*

member must first fill out a form (DA Form 31)[15] and obtain prior approval from her unit commander, a process which might take days or weeks.[16] According to Army regulations, the decision to approve a leave request is entirely discretionary.[17] A DA Form 31 is also required for a shorter duration "pass"[18] if a service woman is not remaining

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tory, Fort Hood, http://www.hood.army.mil/history.aspx (last visited Dec. 29, 2015)), as well as Fort Bliss, Fort Sam Houston, and Red River Army Depot (*see Major Military Installations*, Texas Almanac, http://texasalmanac.com/topics/government/major-military-installations (last visited Dec. 29, 2015)).

[15] DA Form 31, Request and Authority for Leave, http://armypubs.army.mil/eforms/pdf/A31.PDF.

[16] Army Reg. 600-8-10, at 4-3, 4-4, Table 4-2 (Aug 4, 2011), http://www.apd.army.mil/pdffiles/r600_8_10.pdf.

[17] *See* Army Reg. 600-8-10, at 12-3.b ("Approval authorities consider their annual leave program, applicable policy criteria, and mission requirements when processing leave requests"); *see also* Dep't of the Army, Memorandum for All Assigned/Attached Personnel (Dec. 1, 2015), http://usasma.armylive.dodlive.mil/files/2013/07/USASMA-Policy-Memo-03-Military-Leave-Passes-Permissive-TDY-Dec-15.pdf ("Policy Mem. #03") ("All leave requests will be coordinated with the supervisor and balanced against mission."); *see also* Marshall L. Wilde, *Air Force Women's Access to Abortion Services and the Erosion of 10 U.S.C. § 1093*, 9 Wm. & Mary J. Women & L. 351, 352 (2003), http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1168&context=wmjowl ("Should an active duty military woman choose to have an abortion, she must request leave, which her commander has no obligation to grant.").

[18] A regular pass is a "short, non-chargeable, authorized absence from post or place of duty during normal off duty

"in the vicinity of her normal duty station."[19] The regulations do not define the distance that is considered to be "in the vicinity," but individual units may set a mileage restriction. For example, in the case of assigned and attached personnel of the U.S. Army Sergeants Major Academy at Fort Bliss, "[s]oldiers traveling more than 150 miles from Fort Bliss on non-duty days are required to have an approved mileage pass granted by the Executive Director for their department."[20] As with leave, the unit commander must approve regular passes, and the decision to grant passes is also discretionary. *See* Army Reg. 600-8-10, at 5-27.b, 5-28, Table 5-14. Furthermore, non-local travel may require documentation in addition to DA Form 31.[21]

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hours." Army Reg. 600-8-10, at 5-27.a. Under Army regulations, a regular pass "will normally be from the end of normal duty hours on one day to the beginning of working hours the next duty day." Army Reg. 600-8-10, at 5-27.e. Further, a regular pass period cannot be longer than three days, Army Reg. 600-8-10, at 5-27.e(2), nor can pass periods be granted back to back, Army Reg. 600-8-10, at 5-27.g.

[19] The regulation states: "Use the DA Form 31 to authorize absence" but adds that "[a] DA Form 31 is not required if Soldier will remain in the vicinity of his or her normal duty station unless form is required to ensure Soldier is not selected for duty during the period." Army Reg. 600-8-10, at 5-28, Table 5-14.

[20] Policy Mem. #03.

[21] A policy memorandum for assigned and attached personnel of the U.S. Army Sergeants Major Academy at Fort Bliss in Texas, for example, mandates that "[a]ll Soldiers taking non-local leave will complete a POV Risk Assessment and

If HB2 is upheld and fully implemented, causing the vast majority of previously existing licensed abortion facilities in Texas to close—with only ten or fewer facilities remaining open—then service women in that State seeking abortion care would likely need to go through the process of requesting leave or a pass to leave their base and travel to obtain such care. After HB2, the majority of the military bases in Texas would be over a two-hour drive away from a remaining facility in the State—with some over three or even seven hours' drive away. For example, prior to HB2, there was a licensed abortion facility located near the Corpus Christi Army Depot; with HB2 in effect, the closest facility would be over 150 miles away and over a 2-hour drive away, in San Antonio.[22] Furthermore, if a service woman does not have access to a car—which may often be the case for junior service members—traveling to such facilities would be all the more challenging. *See infra* Part I.D. [23]

The consequent burdens imposed on a service woman's ability to obtain abortion care are manifold. First, a service woman may simply not be able

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the online Travel Risk Planning System (TRIPS), both of which will be approved by first line supervisors." Policy Mem. #03.

[22] *See* Appendix.

[23] In addition, a service woman who has an abortion may require recovery time and would likely have to inform her chain of command of her medical state in order to be excused from training events.

to obtain the leave necessary to travel off-base and seek abortion care from a far more distant provider, when factoring in time to travel to distant facilities to obtain abortion care, which will be a reality for many service women based in Texas if HB2 is upheld. Second, the time and delays involved in obtaining the necessary leave to travel the longer distances resulting from HB2, as well as the increased waiting time for appointments due to the lack of availability, all decrease the likelihood that service women will be able to obtain an abortion in a timely manner.[24] Third, having to provide documentation and go through the process of obtaining leave may act as a deterrent to service women seeking abortion care, particularly if a service member may have to disclose the reason why she is requesting leave.[25] Moreover, to the extent a

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[24] Studies recently credited by the Seventh Circuit in *Planned Parenthood of Wis., Inc. v. Schimel* found that the rate of major complications arising out of an abortion during the first trimester is 0.05-0.06 percent (between five one-hundredths of 1 percent and six one-hundredths of 1 percent), whereas the rate of major complications for second trimester abortions is 1.3 percent. 806 F.3d 908, 913, 920 (7th Cir. 2015) (citing to studies).

[25] For example, in a report published by the United States General Accountability Office ("GAO") focusing on service women's healthcare benefits, it was noted that: "[Department of Defense] officials told us that reports from the field have indicated that some line commanders, including officers and senior enlisted personnel, may not understand the importance of women's health care. For active duty women, explaining their specific ailment to their commanding officer (usually male) or appearing like they need

woman seeking to obtain abortion services is required to be accompanied, a service woman would also need to find someone willing and able to accompany her—and such a person, if also a service woman, would similarly need to go through the process of obtaining leave or a pass in order to travel to and from the facility.

Thus, the consequences of HB2 would be extremely burdensome, and create substantial obstacles, for a service woman seeking an abortion in light of the particular limitations on her ability to seek abortion care outside of her military base.

C. HB2 Could Force Service Women In Need of Abortion Care to Disobey Military Rules—and Potentially Face Very Serious Consequences—or Resort to Unsafe or Illegal Methods of Ending a Pregnancy

If a service woman decides to disobey military rules in order to obtain abortion care, due to the constraints imposed by HB2, she would face particular consequences that do not apply to women who

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special treatment may make them reluctant to seek the care they need." *See Defense Health Care: Health Care Benefit for Women Comparable to Other Plans*, GAO-02-602, 14-15 (May 2002) ("Defense Health Care Report"), http://www.gao.gov/new.items/d02602.pdf; *see also* David Vergun, *Doc gives candid talk on women's issues in military*, U.S. Army (Sept. 22, 2014), http://www.army.mil/article/134176/Doc_gives_candid_talk_on_women_s_issues_in_Military (describing issues related to women's health that service women encounter, of which their male counterparts are often unaware).

do not serve in the military. For instance, if a service woman does not obtain the necessary leave, she might decide to leave the base without permission, or—especially in geographic areas where facilities are few and far between—travel beyond the limits of the permitted travel radius or time limitation allowed for her leave. Even if a service woman is granted leave to travel, she may end up missing scheduled duty due to a change in schedule, unexpected difficulties in reaching the facility, or other delays. A service woman could be subject to punishment as a result of disobeying military orders, rules or regulations. For example, a service woman could potentially face restrictions, extra days of duty, forfeiture of pay, written or oral reprimand and a reduction of grade of their ranking.[26] At a more extreme level, if a service member were court-martialed pursuant to UCMJ Article 92 for "failure to obey a lawful order," she could receive a bad conduct discharge, forfeiture of all allowances and pay and up to six months confinement if found guilty of this offense.[27] Thus, HB2 may lead to particularly serious consequences for service women.[28]

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[26] *See* U.S. Army, *Article 15 Information*, Fort Jackson, South Carolina, http://jackson.armylive.dodlive.mil/staff/osja/tds/article-15/ (last visited Dec. 29, 2015).

[27] *See* Joseph L. Jordan, *Article 92 Failure to Obey Order or Regulation*, http://www.jordanucmjlaw.com/Articles/Article-92-Failure-to-Obey-Order-or-Regulation.aspx (last visited Dec. 29, 2015).

[28] In addition, if a service woman is unable to obtain abortion care from an authorized provider as a result of HB2, she

D. The Greater Burdens Imposed by HB2 Would Be Particularly Detrimental to Junior Service Women Beginning Their Military Careers

The greater burdens imposed by HB2 would likely fall hardest on women in the most junior of enlisted ranks, at the outset of their military careers. As a result of HB2, many service women in Texas seeking abortion care will need to travel much further to obtain such services. This additional travel will involve increased transportation costs—and will require a service woman to either obtain access to a car or rely on likely indirect and time-consuming public transportation. Such transportation requirements and increased expenses would be particularly burdensome for junior service women. For example, the base pay of a Private (E1) with less than two years of experience in the Army is less than $19,000 a year.[29] Thus, HB2 is especially burdensome for women who have recently started to serve in the armed forces—and whose service may be derailed as a consequence.[30]

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may resort to using unsafe or illegal methods to end her unwanted pregnancy. As for all women, this could have significant deleterious effects on her health and life.

[29] *See* Dep't of Def., *The United States Military Enlisted Rank Insignia*, http://www.defense.gov/About-DoD/Insignias/Enlisted (last visited Dec. 29, 2015).

[30] *See* Defense Health Care Report, at 24 ("Many of the Army's, Navy's, and Air Force's education initiatives aim to educate leaders and beneficiaries about health care services for women, including family planning and pregnancy well-

E. HB2 Particularly Restricts Service Women's Ability to Access Abortion Services Prior to Deployment

HB2 places particular restrictions on service women in Texas preparing to enter deployment zones. If a service woman becomes aware of an unwanted pregnancy prior to deployment, and wishes to seek an abortion, she may need to do so very quickly before she is deployed—or else risk not being able to join her unit during their deployment.[31] But the drastically reduced availability of abortion care resulting from HB2 may simply make it impossible for a service woman in Texas to obtain such care prior to deployment. Indeed, preparation for deployment begins shortly after the mobilization alert and can involve required briefings, additional training, medical and dental evaluations,

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ness. According to Army officials, unplanned pregnancies can disrupt work and training situations. Army officials told us various studies show that more than half of births to active duty women in the Army are from unplanned pregnancies.").

[31] Regulations and policies prohibit the deployment of service women while pregnant (or require transfer as soon as possible of a service woman whose pregnancy is discovered while she is deployed). *See, e.g.*, Army Reg. 614-30, Table 3.1 (Jan. 27, 2015), http://www.apd.army.mil/pdffiles/r614_30.pdf; Dep't of the Air Force, *Air Force Guidance Memorandum to AFI 48-123, Medical Examinations and Standards*, 175 (2013), http://www.aangfs.com/wp-content/uploads/2012/10/AFI-48-123-Medical-Examination-Standards.pdf; *Pregnancy FAQs*, Navy Personnel Command, http://www.public.navy.mil/bupers-npc/organization/bupers/WomensPolicy/Pages/FAQs-Women'sPolicy.aspx (last visited Dec. 29, 2015).

and possibly counseling to ensure that the service member is ready and able to be deployed.[32] Having to travel long distances for an appointment at one of a very few number of providers—as a result of HB2—is incompatible with preparing for deployment.

* * *

Thus, for all of the above reasons, HB2—which constitutes an undue burden on all women's constitutional rights in Texas—specifically and significantly burdens the constitutional rights of service women to seek abortion care.

II. HB2'S BURDENS ON SERVICE WOMEN AFFECT THE RIGHTS OF A GROWING AND VITAL COMPONENT OF OUR ARMED FORCES

HB2's burdens on service women are particularly egregious as women continue and are increasingly recognized to be a growing and important part of our armed forces.

In just the latest example of this recognition, on December 3, 2015, Secretary of Defense Ashton B. Carter announced that all combat positions in all branches of the military would be open to women,

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[32] Dep't of Def., *Military Deployment Guide: Preparing You and Your Family for the Road Ahead*, 4, http://download.militaryonesource.mil/12038/Project%20Documents/MilitaryHOMEFRONT/Troops%20and%20Families/Deployment%20Connections/Pre-Deployment%20Guide.pdf (last updated Feb. 2012).

without exception.[33] This decision followed a recommendation by the Military Leadership Diversity Commission, which stated that granting service women access to combat positions would eliminate one of the main structural barriers to promotion in the military, because an overwhelming majority of officers and generals come from combat positions.[34]

Secretary Carter's groundbreaking decision was the most recent indicator of the military's increasing support for the inclusion of women. Women have served their country in the armed forces since the turn of the 20th century, when Congress authorized women to work in the Army and Navy Nurse Corps in 1901 and 1908, respectively. Army Reorganization Act, Pub. L. No. 30-192, 31 Stat. 748, 753 (1901); Naval Service Appropriations Act, Pub. L. No. 115-166, 35 Stat. 127, 146 (1908). After women served on a limited and temporary basis in World War II, the Women's Armed Services Integration Act of 1948 created a permanent place for women in the military. Pub. L. No. 625-449, 62 Stat. 356 (1948). In 2013, Secretary of Defense Leon Panetta overturned the ground combat exclusion rule for women.[35] Following a careful three-

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[33] Ashton B. Carter, Sec'y of Def., *Pentagon Press Briefing Room, Remarks on the Women-in-Service Review* (Dec. 3, 2015).

[34] Mil. Leadership Diversity Comm'n, From Representation to Inclusion: Diversity Leadership for the 21st-Century Military 67 (2011) ("Diversity Leadership Report").

[35] *See* Memorandum from Martin E. Dempsey, Chairman, Joint Chiefs of Staff & Leon E. Panetta, Sec'y of Def., to

year review period, Secretary Carter determined that women should not be excluded from any positions.[36]

Women currently constitute between 7 and 20 percent of soldiers in each branch,[37] and the military has prioritized the inclusion of women during all stages of their careers, from recruitment and accession to assignments, promotion, and retention.[38] Recruitment goals for women in the coming years have been increased—for example, U.S. Secretary of the Navy Ray Mabus has emphasized the importance of recruiting of women, recently indicating that he wishes to increase female recruitment to 25 percent, up from the current 18 percent for the Navy and about 5 percent for the Marines.[39]

Secretaries of the Military Departments on the Elimination of the 1994 Direct Ground Combat Definition and Assignment Rule (Jan. 24, 2013).

[36] An analysis released by the Pentagon states that Secretary Carter's decision to open all jobs in combat to female service members "further alters the factual backdrop" of *Rostker v. Goldberg*, 453 U.S. 57 (1981), which exempted women from a military draft. Dep't of Def., *Women in Service Review Selective Service Legal Analysis*, http://www.defense.gov/Portals/1/Documents/wisr-studies/Women%20In%20Service%20Review%20Selective%20Service%20Legal%20Analysis.pdf (last visited Dec. 29, 2015). This raises the possibility that the Military Selective Service Act may change.

[37] *See* 2014 Demographics Report, at 18-20.

[38] *See* Diversity Leadership Report, at 39-40.

[39] Meghann Myers, *Mabus to Push Big Changes to PT, Career Opportunities*, Navy Times (May 13, 2015), http://

Many in the military have recognized that the armed forces are more effective when composed of a diverse set of individuals. According to General George W Casey, Jr., diversity is a "combat multiplier" because it allows for "different views to deal with diverse culture and the complexities" that the military confronts.[40] Furthermore, an active approach to diversity helps to ensure that no talented individuals are "left behind" due to prejudice or discrimination.[41]

In order to further the inclusion of women in the armed forces and as more women join the ranks, service women's constitutional rights—including not being subject to undue burdens on access to abortion care—must be protected. Failing to do so is inconsistent with, and may undermine, the current trend of increasing recruitment and retention of women in the military, and thus hinder the goal of a diverse and effective armed forces.

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www.navytimes.com/story/military/2015/05/12/navy-secretary-mabus-fitness-women-seals-changes/27170391.

[40] Diversity Leadership Report, at 16.

[41] *Id.* at 17.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge the Court to reverse the Fifth Circuit's decision.

Respectfully submitted,

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APPENDIX

APPENDIX

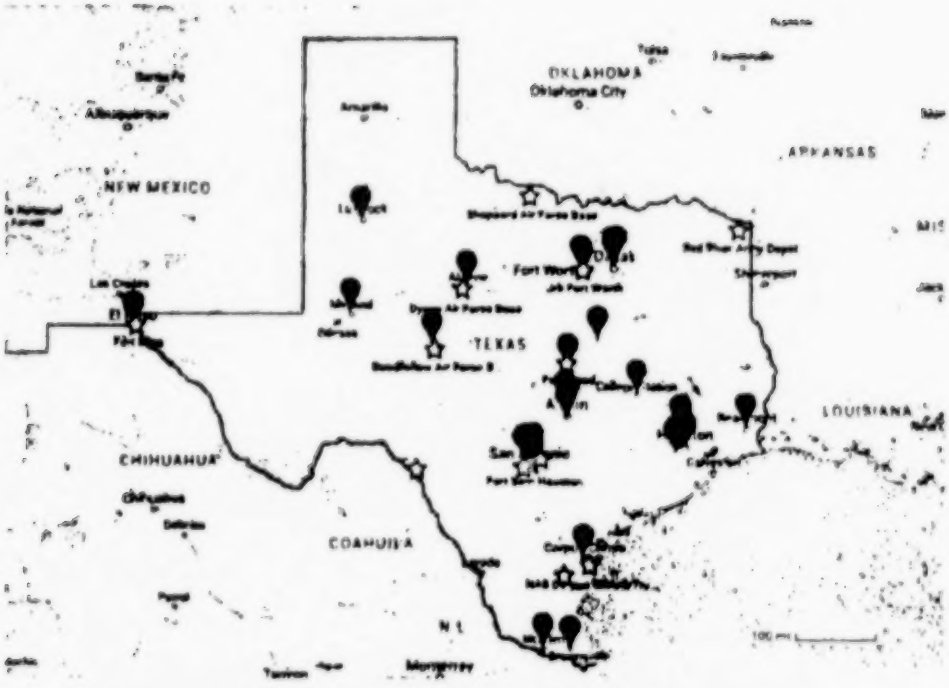

Figure 1: Location of open facilities providing abortion care (balloon markers) in relation to military bases (stars), pre-HB2

Sources: *State of Texas*, MilitaryINSTALLATIONS, http://www.militaryinstallations.dod.mil/pls/psgprod/f?p=MI:CONTENT:0::::P4_INST_ID,P4_TAB:320049,SI (last visited Dec. 29, 2015); J.A. 229-30.

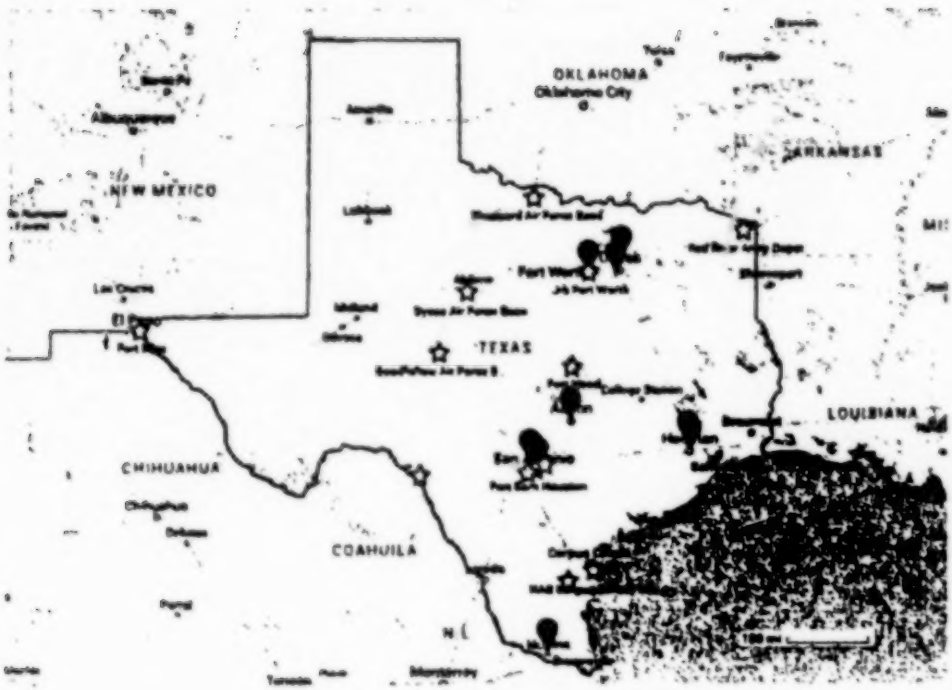

Figure 2: Location of open facilities providing abortion care (balloon markers) in relation to military bases (stars), post-HB2

Note that, according to Petitioners, the McAllen clinic would only be able to provide limited services. See J.A. 1431.

Sources: *State of Texas*, MilitaryINSTALLATIONS, http://www.militaryinstallations.dod.mil/pls/psgprod/f?p=MI:CONTENT:0::::P4_INST_ID,P4_TAB:320049,SI; (last visited Dec. 29, 2015); J.A.1429-42.